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CHARLES ELMORE CROPLEY

No. 23

In the Supreme Court of the United States

October Term, 1948

[redacted]

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[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 22

VERMILYA-BROWN COMPANY, INC., ET AL.,
PETITIONERS

v.

JOHN JOSEPH CONNELL, ET AL.

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF PETITION FOR REHEARING

The Solicitor General urges that the Court reconsider its holding herein that the word "possession," as used in the phrase "State * * * or any Territory or possession" in Section 3 (c) of the Fair Labor Standards Act, is not a word of art and that the Bermuda defense area leased to this country in 1940 by Great Britain is within the coverage of the statute as a "possession."

It is anticipated by the Government agencies directly concerned that grave difficulties will necessarily flow from this decision. To a certain extent, consequences of first importance were indicated by the Department of State letter set forth in the Government's *amicus* brief earlier

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filed in this case (pp. 49–54). A further communication from the Department of State, attached hereto as Appendix A, pp. 8–10, reiterates and enlarges upon the earlier letter, both emphasizing the belief that the decision now reached by this Court will have "an unfavorable effect on the foreign relations of the United States, both with respect to the bases leased from Great Britain under the Agreement of March 27, 1941 and bases acquired from other countries * * * [and] might make more difficult negotiations for similar bases in the future."

This view of the State Department is strongly supported by the Departments of the Army and Navy. Statements from those agencies, annexed hereto as Appendices B and C, pp. 11–19, also point out in some detail the problems, particularly those arising from the use of foreign employers and alien labor, which will be immediately encountered in existing classified as well as unclassified defense areas. The letter from the Army states:

> To give appropriate effect to the just-quoted ruling of the Court will impose the most serious problem of any arising from the decision. During the past nine years of employment experience in foreign countries, Army contracting officers have discovered (whether the employment was handled directly or through a CPFF contractor) that in hiring native workmen the local government in many countries will

impose *maximum* wage standards which dare not be violated. These standards are sometimes fixed by statute or regulation with the force of statute, and other times by policy which has the practical effect of law. Such governments explain that to pay native workmen according to American wage standards would seriously disrupt the local economy. Also, in many industrially undeveloped countries, local officials advise that "excessive" wages to common laborers would jeopardize the availability of such laborers and impose serious police problems upon the state. (It should be noted that the social and economic structure of many areas, organized along tribal lines, precludes a direct dealing with individual laborers.) It appears doubtful that the Court has been sufficiently apprised of this special problem. The payment of statutory overtime to American personnel at contractors' overseas construction sites will be a minor problem in comparison with paying of statutory minimum wages *and* overtime to native workmen in the face of militant opposition by foreign governments. (It should be noted that among American personnel all laborers and mechanics, skilled and semi-skilled artisans and craftsmen, have always been paid on hourly rates with overtime benefits far exceeding statutory requirements; the only employees of Army contractors—at either continental or overseas sites—who have not been extended pay benefits within the letter of the statute

are the so-called non-manual employees; these non-manuals include office and white-collar personnel, specialists, supply and security workers, and semi-supervisory employees, hired on a salary basis.)

* * * * *

Two specific rulings of the Court—that native workmen are covered by the Act, and that these bases on foreign soil are "possessions" of the United States in spite of foreign sovereignty—may be expected to render extremely difficult, if not impossible in some instances, the efforts of the Department of the Army in carrying out its governmental function of implementing the defenses of this country at strategic global sites on foreign soil. Although it is too early to predict the effect of the decision upon the continued prosecution of the projects listed above, it would not be unexpected if some of the foreign governments involved were to compel the curtailment or abandonment of said projects. It certainly must be expected that the negotiation of future arrangements for base construction on foreign soil (in which representatives of this Department ordinarily participate) will be met by vigorous opposition on the part of some foreign governments in the face of these two specific holdings of the Court. The uncertainty of the scope of this decision, with respect to the type of authority the United States exercises at the situs of various overseas operations—as pointed out in the minority

> opinion of the Court—will undoubtedly further handicap such future negotiations, inasmuch as no foreign government can any longer be certain that clear limitations placed in any lease or agreement will not subsequently be "lightly repudiated by another branch of our Government."

The Wage and Hour Administrator has, at our request, stated some of the problems of administration and enforcement of the Fair Labor Standards Act which flow from the decision. His views are set forth in Appendix D, pp. 20–24.

We believe that the Departmental views contained in the statements annexed hereto justify our request that the Court reconsider its decision herein before permitting the judgment to become final. For they demonstrate that this Court had not adequately been apprised of the practical effects of subjecting foreign workers to the Fair Labor Standards Act, both in regard to its impact on foreign policy and upon the actual administration of the American statute. We think these factors demonstrate that if Congress had addressed itself to the instant problem it would not have wished the American labor standards act to apply in the leased areas.

In addition, we wish to direct the Court's attention to the far-reaching effect that the present decision will have as a general precedent for giving extra-territorial effect to many existing statutes. For the decision raises problems which

it does not answer as to the territorial scope of every statute containing the same or similar language; it certainly cannot now be said with any safety that any such laws do not apply to the leased areas, and unless the decision is changed there will be continued uncertainty both in and out of the United States as to what is the applicable law.

A graphic illustration is furnished by the opinion of the Court of Appeals for the Second Circuit in *Spelar* v. *United States*, C. A. No. 33, October Term, 1948, decided December 8, 1948, Appendix E, pp. 25–31, *infra*. In the *Spelar* case, the Court of Appeals held that the Federal Tort Claims Act applied in defense base areas largely on the strength of this Court's decision in the instant case. The language there involved concerned exclusion from the coverage of the Federal Tort Claims Act of any claim "arising in a foreign country." 28 U. S. C. 943 (k). No particular note was made by the Court of Appeals of the difference between that language and the language of the Fair Labor Standards Act involved herein. Nor did the Court of Appeals inquire into the legislative purpose under the Tort Claims Act or analyze the provisions of that statute. Rather, the decision herein was taken as conclusive on the status of defense base areas for purposes of construing general statutory provisions. The understanding of the court of ap-

peals as to the effect of the decision herein is illustrated by that court's characterization of the lease to the United States of the base in Newfoundland as involving "the cession of the area * * * [with] the fact of grant and occupancy * * * not challenged * * *."

For the reasons set forth above, we urge that rehearing be granted herein and that the Government be afforded full opportunity to present its views by brief and oral argument.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1948.

APPENDIX A

(Department of State Letter)

DECEMBER 16, 1948.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to the Department's letter of January 30, 1948 concerning the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *John Joseph Connell, et al.* v. *Vermilya-Brown Company, Inc., et al* holding that the defense bases in Bermuda are "possessions" of the United States within the meaning of the Fair Labor Standards Act of 1938.

The letter referred to indicated the Department's concern that the decision would have an unfavorable effect on the foreign relations of the United States, both with respect to the bases leased from Great Britain under the Agreement of March 27, 1941 and bases acquired from other countries. Moreover, it pointed out that the decision might make more difficult negotiations for similar bases in the future. The authority of the Supreme Court's decision of December 7, 1948 affirming the judgment of the Circuit Court of Appeals has of course increased the concern felt by the Department. While the Court's postulated agreement with the Department's view that the bases leased from Great Britain remain under its sovereignty and are not part of the territory of the United States in a political sense removes the uncertainty on this point left by the decision

of the Circuit Court of Appeals, the conclusion of the Court that the bases are "possessions" of the United States and the bases on which that conclusion was reached are not reassuring.

As indicated in the letter of January 30, 1948, the Department considers unfortunate the conclusion of the Circuit Court of Appeals that the United States leased base in Bermuda is a possession of the United States comparable to other areas long known as "possessions" of the United States such as Alaska, Hawaii, Puerto Rico, Guam, Samoan Islands, Virgin Islands and the Canal Zone. The territories referred to are under the sovereignty of the United States, with the exception of the Canal Zone in which the United States exercises full sovereign rights. No comparable situation exists in Bermuda or the other bases leased from Great Britain nor does the United States have "sole power" in the leased areas as inferred by the Court. The rights of the United States as indicated in more detail in the letter of January 30, 1948 are limited to those necessary to operate the leased areas as military bases and are not full sovereign rights such as those it enjoys in the Canal Zone. Furthermore, the Department does not share the assurance of the Court that the house of assembly of Bermuda or other colonial legislatures might not undertake legislation similar to the Fair Labor Standards Act to control labor relations on the bases. It is at least worthy of note in this connection that administrative difficulties have arisen in the bases by reason of the application to contractors' employees of workmen's compensation laws of both the United States and the colonies concerned.

The Department understands that a petition for a rehearing of the case before the Supreme Court will be filed and will be supported by the Department of Justice on behalf of the Government. The purpose of this letter is to indicate the Department's full support of that petition in view of the unfavorable implications of the Court's decision from the standpoint of the foreign relations of the United States.

Sincerely yours,

For the Secretary of State:

JACK B. TATE,
Acting Legal Adviser.

The honorable TOM C. CLARK,
Attorney General.

APPENDIX B

(Department of the Army Letter)

11 DECEMBER 1948.

THE HONORABLE
THE ATTORNEY GENERAL

DEAR MR. ATTORNEY GENERAL: Reference is made to the lawsuit of *Vermilya-Brown et al.* vs. *Connell et al.* (No. 22 in the Supreme Court of the United States) which involves Fair Labor Standards Act claims by former employees against a Department of the Army cost-plus-a-fixed-fee contractor who built defense bases in Bermuda pursuant to our 99-year lease with Great Britain.

The principal contention of the petitioner (Vermilya-Brown) was that the F. L. S. Act did not apply to employment in leased areas on foreign soil inasmuch as the geographical coverage of said Act was limited to the continental United States and the "Territories and possessions." As you know, the Court, by a 5 to 4 decision, on 6 December 1948 ruled against the petitioners, holding that the word "possession" as used in the statute is not a "word of art" and that it includes those areas over which the United States has "sole power" whether or not it has "sovereignty" over them (17 Law Week 4033).

It is the opinion of this Department that such holding is extremely unfortunate and was not compelled by any of the considerations present

in the case, and it is hoped that the Court may be induced to set aside the initial decision upon a full consideration of the grave and far-reaching implications that stem from this decision. Counsel for petitioners have already been instructed to petition for a re-hearing of the matter. Upon the request of this Department, and with the written support of the Department of State, your Department filed a Memorandum with the Court in support of the Petition for Writ of Certiorari, and thereaffer filed a Brief as Amicus Curiae supporting the petitioner's position. In view of the subsequent developments related above, it is requested that your Department file with the Court a Brief as Amicus Curiae in support of the forthcoming Petition for Rehearing.

It may be noted that the practice and policy of the contracting Agencies for operations in foreign areas (principally the Departments of the Army and Navy), as well as the official pronouncements of the Departments of State, Justice and Labor, are contrary to this holding of the Court. Moreover, the position that the word "possession" as used in this statute *is* a "word of art" appears to be strongly supported by the fact of its uniform use in similar statutes over a period of many years. In his dissent Justice Jackson cites 63 statutes using the phrase "Territories and possessions," and 12 others which refer to "island" or "insular" possessions.

Although Army CPFF contractors who have operated in leased foreign areas have only twelve or fifteen F. L. S. A. suits now pending against them arising from such "foreign" employment, the implications of this decision on present and

future overseas construction operations of the Army are tremendous. By virtue of said decision, the Act immediately applies, retroactively for one year, to the following partially completed projects:

The Philippines—two contracts—70 million dollars
Newfoundland—one contract—25 million dollars
Okinawa—three contracts—47 million dollars
Iceland—one contract—17 million dollars
Greece—two contracts—80 million dollars
Bermuda—one contract—2 million dollars
Canada—one contract—½ million dollars

All but the Canadian contract are of the CPFF type under which the Government will bear the increased labor cost. As to future contracts, the Government will bear such increased labor cost even under "lump-sum" contracting because of the higher bids which will inevitably result. The increase thus to be expected in present and future contract costs for foreign construction cannot be predicted with any degree of accuracy, but judging by experience statistics on work within the United States the increase will doubtless run into the hundreds of millions.

In addition to the present projects listed above there are other CPFF construction contracts now being performed on foreign soil which cannot be identified here because such operations are of a "classified" nature. Judging by war-time experiences, it may be noted in passing that the difficulty of maintaining appropriate secrecy as to such projects is heightened considerably by the litigation which inevitably results from injecting

doubts and problems over statutory labor rights into the situation.

An immediate result of this decision will be the necessary revision by Army and Navy contracting agencies of their entire labor relations policy for overseas areas, as well as the organization, records and arrangements for each existing contract; moreover, the estimated cost of each contract will have to be increased sharply, with the alternative result of eliminating various vital portions of the projects or of obtaining supplemental appropriations therefor. The principal portion of such increased cost will result, not from overtime allowance for American personnel, but, from the increased wage rates for native workmen (who outnumber the American workmen by about 10 to 1) that will be required by the minimum wage provisions of the Act. The application of such wage minimums to native workmen is clearly required by the Court's language in this decision: "Since citizens of this country (Bermuda) would be numerous among employees on the base, the natural legislative impulse would be to give these employees the same protection that was given those similarly employed on the islands of the Pacific (Territories and possessions such as Hawaii, Guam, etc)."

To give appropriate effect to the just-quoted ruling of the Court will impose the most serious problem of any arising from the decision. During the past nine years of employment experience in foreign countries, Army contracting officers have discovered (whether the employment was handled directly or through a CPFF contractor) that in hiring native workmen the local govern-

ment in many countries will impose *maximum* wage standards which dare not be violated. These standards are sometimes fixed by statute or regulation with the force of statute, and other times by policy which has the practical effect of law. Such governments explain that to pay native workmen according to American wage standards would seriously disrupt the local economy. Also, in many industrially undeveloped countries, local officials advise that "excessive" wages to common laborers would jeopardize the availability of such laborers and impose serious police problems upon the state. (It should be noted that the social and economic structure of many areas, organized along tribal lines, precludes a direct dealing with individual laborers.) It appears doubtful that the Court has been sufficiently apprised of this special problem. The payment of statutory overtime to American personnel at contractors' overseas construction sites will be a minor problem in comparison with paying of statutory minimum wages *and* overtime to native workmen in the face of militant opposition by foreign governments. (It should be noted that among American personnel all laborers and mechanics, skilled and semi-skilled artisans and craftsmen, have always been paid on hourly rates with overtime benefits far exceeding statutory requirements; the only employees of Army contractors—at either continental or overseas sites—who have not been extended pay benefits within the letter of the statute are the so-called non-manual employees; these non-manuals include office and white-collar personnel, specialists, supply and security workers,

and semi-supervisory employees, hired on a salary basis.)

The further problem of administration is posed by the fact that the decision of the Court does not delineate with certainty the areas to which the coverage of the Act is now extended. The Court has said: "* * * it is difficult to formulate a boundary to its coverage short of areas over which the power of Congress extends, by our sovereignty or by voluntary grant of the authority by the sovereign lessor, to legislate * * *" and "it seems reasonable to interpret its provisions to have force where the nation has sole power, rather than to limit the coverag to sovereignty." If in fact the United States does have "sole power" over the leased base in Bermuda (in spite of the apparent limitations imposed by Great Britain), then it is difficult to see how application of the Act can stop short of "Trust" areas, mandated areas, areas under informal rights of entry, diplomatic posts, occupied enemy countries etc.

Two specific rulings of the Court—that native workmen are covered by the Act, and that these bases on foreign soil are "possessions" of the United States in spite of foreign sovereignty—may be expected to render extremely difficult, if not impossible in some instances, the efforts of the Department of the Army in carrying out its governmental function of implementing the defenses of this country at strategic global sites on foreign soil. Although it is too early to predict the effect of the decision upon the continued prosecution of the projects listed above, it would not be unexpected if some of the foreign governments involved were to compel the curtailment or aban-

dominent of said projects. It certainly must be expected that the negotiation of future arrangements for base construction on foreign soil (in which representatives of this Department ordinarily participate) will be met by vigorous opposition on the part of some foreign governments in the face of these two specific holdings of the Court. The uncertainty of the scope of this decision, with respect to the type of authority the United States exercises at the situs of various overseas operations—as pointed out in the minority opinion of the Court—will undoubtedly further handicap such future negotiations, inasmuch as no foreign government can any longer be certain that clear limitations placed in any lease or agreement will not subsequently be "lightly repudiated by another branch of our Government."

Sincerely yours,

/s/ KENNETH C. ROYALL,
Secretary of the Army.

APPENDIX C

THE SECRETARY OF THE NAVY,
Washington, 14 December 1948.

MY DEAR MR. ATTORNEY GENERAL: On December 6, 1948, the Supreme Court of the United States, by a five to four decision, affirmed the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Vermilya-Brown Company, Inc., et al.* v. *Connell et al.* In this action, the Court held that the Fair Labor Standards Act of 1938 was applicable to territory leased by the United States from Great Britain.

The Department of the Navy is interested in the ultimate disposition of the *Vermilya-Brown* case since the application of the Fair Labor Standards Act to work performed by the Navy's cost-plus-a-fixed-fee contractors at the leased bases would not only increase the cost of such work but would, in our opinion, adversely affect future operations. In this connection, you are advised that several of such actions have been brought against contractors for work performed at such bases. Consequently, if the decision in the *Vermilya-Brown* case is permitted to stand, it may subject this Department to a substantial financial liability.

It has been and is the policy of this Department to employ local labor at the leased bases to the maximum extent practicable and to make its wage and labor practices with respect thereto conform as nearly as possible to the usual wage and labor practices of the particular locality. Appli-

cation of the Fair Labor Standards Act to the particular areas involved may well create conditions which would adversely affect the cooperation heretofore given Navy contractors by local authorities. The continued cooperation of such authorities is, of course, highly desirable.

In view of the foregoing, I believe it would be to the best interests of the Government for a petition for rehearing to be filed with the Court if, in your opinion, sound legal grounds exist for such action.

Sincerely yours,

/s/ M. E. ANDREWS,
Acting Secretary of the Navy.

THE HONORABLE TOM C. CLARK,
Attorney General of the United States,
Washington, D. C.

Copy to
Mr. Frank Tribbe
T-7, Rm 1523, Grav. Pt., Va.
Mr. Bernard S. White
2B78 Y&D Annex

APPENDIX D

U. S. DEPARTMENT OF LABOR

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

WASHINGTON 25, D. C., *December 23, 1948.*

The HONORABLE PHILIP B. PERLMAN,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: By letter dated December 22, 1948, you advise that you intend to support a petition for rehearing to be filed in connection with the recent decision of the Supreme Court in *Vermilya-Brown Company* v. *Connell*, No. 22, This Term, decided December 6, 1948. You state that you will present to the Court the views of the Departments of State, Army, and Navy. On behalf of these Departments, and the Department of Justice, you will urge the Court to reconsider its holding that the word "possession," as used in the phrase "State, territory or possession" in Section 3 (c) of the Fair Labor Standards Act, is not a term of art, and that the Bermuda defense area leased to us in 1940 by Great Britain is within the coverage of the statute as a "possession." You request that I forward to you my views concerning the effect which this holding may have on administration and enforcement of the Act.

I think it may fairly be said that my predecessors and I, in considering the territorial aspects of wage-hour coverage in the past, have proceeded on the assumption that traditional concepts of sovereign control were implicit in the meaning of the phrase, "any Territory or possession of the United States," as that phrase is used in the Fair Labor Standards Act. In the absence of controlling court decisions, it was necessary for us to interpret the phrase for our guidance in the administration of the Act. In doing so, we not only studied the provisions of other statutes in which these terms were used and authoritative decisions of the courts construing such language in situations which were thought to be comparable, but gave particular weight to authoritative expressions of the State Department and other proper governmental agencies on the question of what areas are viewed as Territories or possessions over which the United States exercises full sovereign rights. On this basis we expressed the opinion in Interpretative Bulletin No. 2, first issued in November, 1938, and in Chapter V, Part 776, Title 29 of the Code of Federal Regulations (section 776.1 (c)) which replaced this bulletin in July, 1947, that Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, and the Virgin Islands were Territories and possessions within the meaning of the Act.

When the question of the status of the leased bases of the type involved in the *Vermilya-Brown* case was first brought to our attention in 1942 and 1943, we expressed the view, in the opinions quoted in the Government's brief before the Supreme Court, that these bases were not Terri-

tories or possessions of the United States within the meaning of the Act. This view was subsequently modified after it appeared that the matter was being litigated in the courts and consultation with State Department officials indicated that that Department had made no ruling (the letter from that Department which is Appendix A to your brief not having been written at that time). This modification of our position is reflected by the following language which was used to advise inquiries: "Until the question has been settled by court decisions, congressional or executive action, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees working at bases leased from the British."

As a result of the Supreme Court's decision in the *Vermilya-Brown* case, it appears that the status of a given area as a "Territory or possession of the United States" for purposes of the Act is subject to determination on the basis of considerations other than those used by the political departments of the Government, on which we have placed particular reliance in the past. I anticipate that at least two major problems will confront me as a result of the Court's ruling.

First, in order to perform my statutory duties under the Act, it will be necessary for me to decide initially, pending authoritative guidance from the courts, whether other defense base areas come within the statutory language covering Territories and possessions of the United States. If, as would seem to follow from the Court's decision, I would not be aided in this by the views

of the State Department as to whether such areas are Territories or possessions in the political sense, or under traditional concepts of sovereignty, I shall be called upon to enter a field of interpretation in which our previous experience with the Act offers no reliable guides, and which may involve the meaning of international agreements on which this agency would ordinarily seek the advice of the State Department. Adequate standards for guidance in deciding such questions for purposes of administration of the Act are, in my opinion, not available to me, either in the language of the statute, its legislative history, or in the *Vermilya-Brown* decision itself. The difficulty, in such circumstances, of reaching sound conclusions concerning coverage in bases such as Okinawa, Greece, Iceland, Canada, Newfoundland, the Philippine Islands, Tunisia, and Arabia is apparent. My position will be even more difficult in connection with classified military base areas.

Second, even if I should be able to reach sound conclusions as to the application of the Act in these areas, I cannot help but foresee fundamental administrative difficulties in attempting to apply the Act in "possessions" over which the United States does not exercise full sovereign rights, especially where foreign employers and alien labor are involved. Even if such difficulties may not be insuperable, vexing problems of courts with proper jurisdiction and venue to apply the criminal and civil sanctions in such cases are, it seems to me, bound to arise if we are to undertake active enforcement in these bases. And, as you will appreciate, neither the appropriation

for, nor the originization of the Wage and Hour Division were devised in contemplation of enforcement efforts in outposts such as these.

It has, of course, not been possible for us to explore fully these and other possible problems which might confront us as a result of the *Vermilya-Brown* decision, in the limited time available to us by reason of the period for filing petitions for rehearing. If the Court should grant a rehearing in the case, I shall be glad to make available to you the results of our further exploration of these questions in order that you may fully apprise the Court of my views concerning the probable effects of the present decision in terms of the over-all administration of the Fair Labor Standards Act.

Very truly yours,

WM. R. MCCOMB,
Administrator.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 33—OCTOBER TERM, 1948

(Argued November 3, 1948—Decided December 8, 1948)

DOCKET NO. 21041

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Before: L. Hand, Augustus N. Hand and Clark, *Circuit Judges*

Appeal from the United States District Court for the Eastern District of New York.

Action for wrongful death under the Federal Tort Claims Act by Lillian Spelar, as administratrix of the estate of Mark Spelar, deceased, against the United States of America. From an order dismissing the complaint for lack of jurisdiction, D. C. E. D. N. Y., 75 F. Supp. 967, the plaintiff appeals. Reversed and remanded.

Arnold B. Elkind, of New York City (Gerald F. Finley, of New York City, on the brief), for plaintiff-appellant.

Frank J. Parker, Chief Asst. U. S. Atty., of Brooklyn, N. Y. (J. Vincent Keogh, U. S. Atty., of Brooklyn, N. Y., on the brief), for defendant-appellee.

CLARK, Circuit Judge:

Does the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country," 28 U. S. C. A. § 943 (k), Revised Title 28, United States Code, § 2680 (k), prevent recovery from the United States of America for wrongful death occurring on a Government airfield in Newfoundland in an area covered by a 99-year lease and executive agreement as a part of the famous "destroyer deal" between Great Britain and the United States of March 27, 1941? In dismissing this action the district court has held that it does. D. C. E. D. N. Y., 75 F. Supp. 967. We are constrained to disagree.

Plaintiff is administratrix of her husband's estate under letters issued by the Surrogate's Court of Queens County, New York. Her husband was a flight engineer, an employee of American Overseas Airlines, Inc., who was killed by the crashing of his plane just as it had taken off from Harmon Field, in or near Stephenville, Newfoundland, on October 3, 1946. Compare *Spelar v. American Overseas Airlines, Inc.*, D. C. S. D. N. Y., 80 F. Supp. 344. Plaintiff's complaint alleges that his death was due to the negligence of representatives of the United States and that un-

der the laws of Newfoundland, Consol. Stat. of Newfoundland, 3d Ser., c. 213, an action for wrongful death is created, upon which the plaintiff relies as establishing her claim under the Federal Tort Claims Act. The complaint was dismissed below on the defendant's motion for lack of jurisdiction.

The Act as passed in 1946 gave exclusive jurisdiction to the United States district court for the district wherein the plaintiff was resident or wherein the act or omission complained of occurred, "including the United States district courts for the Territories and possessions of the United States," on claims against the United States for death by the negligent or wrongful act or omission of any Government employee while acting within the scope of his employment, "under circumstances where the United States, if a private person, would be liable to the claimant for such * * * death in accordance with the law of the place where the act or omission occurred." 28 U. S. C. A. § 931 (a). This is continued in the revision, Title 28, United States Code, § 1346 (b), except that here the district courts are spelled out to designate those of Alaska, the Canal Zone, and the Virgin Islands. Since obviously the revision was not intended to limit the coverage, the reference to the original form is of importance, as indicating a congressional recognition of claims in the "possessions" of the United States.

The nature of the 99-year lease and executive agreement entered into between Great Britain and the United States, as set forth in 55 Stat., Pt. 2, 1560–1594, is discussed at some length in

Connell v. *Vermilya-Brown Co.*, 2 Cir., 164 F. 2d 924, where we held that the Bermuda base transferred pursuant to this same agreement was a "possession" of the United States within the applicability of the Fair Labor Standards Act. Since the argument of this appeal, the Supreme Court has affirmed that case. *Vermilya-Brown Co.* v. *Connell*, S. Ct., Dec. 6, 1948. Although different statutes are involved, it would seem clear that that decision is certainly persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another. Moreover, in the passage quoted above, Congress appears to have recognized the applicability of the Act to possessions of the United States. While defendant here did not cite or discuss the Connell case, the district judge below attempted to distinguish it, substantially on the ground that the present statute was not crystal clear and that a congressional waiver of sovereign immunity was to be narrowly construed. This doctrine of "niggardly" construction has been cited in this Act, *State of Maryland, to Use of Burkhardt*, v. *United States*, D. C. Md., 70 F. Supp. 982, though we have had occasion to criticize such application. *Aetna Cas. & Surety Co.* v. *United States*, 2 Cir., — F. 2d —, —. When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself. Particularly should

this be true as to the broad terms of coverage employed in the basic grant of liability itself.[1]

In our view, however, the statutory exception referring to "a foreign country" is sufficiently precise and explicit that, even without the Connell precedent, this claim must be held included in the coverage of the Act. The language of the grant to the United States of the area is explicitly that of a definite lease of territory for a particular period.

As pointed out in the Connell case, there was also incorporated an extensive grant of judicial jurisdiction and of general powers to carry out the purpose of the cession, namely, the establishment of the air bases. There has been much discussion of the somewhat mystic problem as to how far "sovereignty" has been granted; however that may be decided, it would seem that where the United States constructs, operates, and controls an air base so completely as is the actual fact, so obviously in direct line with the intent of the contracting governments, it is on the whole fantastic to consider this territory a foreign country within the meaning of a local statute affecting the relation of this government and private persons.[2]

[1] Congress has indicated this policy by its amendment in 1947 to destroy the basis of defenses made by the Department of Justice in actions based on statutes in two states locally defined as only punitive and not remedial in nature; the amendment extends recovery to cover these cases. See 28 U. S. C. A. § 931 (a) as amended Aug. 1, 1947, c. 446, § 1, 61 Stat. 722, and H. R. Rep. No. 748, 80th Cong., 1st Sess., U. S. Code Cong. Serv. 1947, p. 1548.

[2] Compare *De Lima* v. *Bidwell*, 182 U. S. 1, 180: "A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sover-

Moreover, in the light of the statutory purpose here the result seems the same. The only ground suggested for this particular exception is that defense of such claims, including the locating, preserving, and use of evidence, would involve too great a practical problem to make waiver of immunity as to them either fair or feasible. But if this be the reason for the exception—and it seems to us a reasonable explanation—it surely does not exist in the case of a government-owned-and-controlled air base. Actually with respect to this very accident, there seem to have been the most complete reports and investigations, as would be usual by the Government agencies in such a situation.

The United States Attorney ably and vigorously urges not only the objections we have already noticed, but others, which nevertheless do not persuade us. There seems no difficulty in the reference of the statute back to the local law of the area, here the Newfoundland law which the plaintiff has alleged and plans to prove. Such reliance on foreign law as the source of rights locally enforced is of course not at all unusual in our courts. Nor does it seem of importance that actually the United States has not established any district courts at this air base. We are now particularly concerned with the existence of the right, which must be established before we need turn to the form of remedy. But the remedy here is fully adequate and complete in

eignty of a foreign nation; and without the sovereignty of the United States. The Eliza, 2 Gall. 4, Fed. Cas. No. 4,346; *Tabor v. United States*, 1 Story 1, Fed. Cas. No. 13,722; The Adventure, 1 Brock. 235, 241, Fed. Cas. No. 93."

the alternative provision of the statute as quoted above, allowing venue at the plaintiff's residence as here. Nor do we see any possibility of political complications. The executive agreement is too carefully drawn, it too well adjusts the various rights of the two countries involved, to make it seem possible that any difficulty can arise if the United States pays private claims made against it for negligence at these air bases. Finally, however one may regard the much discussed issue of the relative scope of the executive agreement as against the treaty, it cannot be escaped here that the cession of the area has actually been made and the fact of grant and occupancy is not challenged by anyone. It would certainly be too refined a thesis to deny this plaintiff recovery on the ground that, though the high contracting parties were quite satisfied, the grant was inoperative because it was made pursuant to executive agreement, and not treaty. Were this thesis to be adopted, then indeed this private litigation might have political, if not international, complications vastly embarrassing, one fancies, to this very defendant here.

Reversed and remanded.

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